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In The

Supreme Court of the United States

October Term, 1992

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

Petitioner,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the thirty (30) day time period in which to file (with the United States Claim Court[1]) a Motion for Review of a Special Master's Decision in a vaccine compensation case [pursuant to 42 U.S.C. § 300aa-12(e)(1) and RUSCC, Appendix J. Vaccine Rule 11(a)] jurisdictional or can this time period be equitably tolled or waived in the interest of justice should the circumstances so warrant and permit relief of a judgment so entered by the Claims Court (for an untimely filing), such relief pursuant to RUSCC, Rule 60?

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1. On October 29, 1992, the Federal Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), became effective. Pursuant to Title IX, the United States Claim Court was renamed the United States Court of Federal Claims and the Rules of the United States Claims Court (abbreviated "RUSCC") were changed to the Rules of the United States Court of Federal Claims (abbreviated "RCFC"). For sake of clarity and consistency, especially since referenced in the lower court opinions, the Petitioner will continue to cite the rules of procedure as "RUSCC" and the court as the "United States Claims Court."

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No.

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DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

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SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dawn R. Widdoss, n/b/m Dawn R. Hineline, *et al.*, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit rendered on March 24, 1993, issued as a mandate on May 7, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is attached as part of the Appendix. (Appendix, pages 1a to 23a.) This decision is reflected at __ F.2d __ (1993).

STATEMENT OF JURISDICTION

The opinion and order sought to be reviewed is that of the United States Court of Appeals for the Federal Circuit dated March 24, 1993, to No. 92-5096. (A subsequent errata sheet to same dated April 5, 1993, was also filed by the Court.)

A timely petition for rehearing pursuant to Fed. R. App. P.-Federal Circuit, Rule 40 was filed and, by order filed on April 30, 1993, such petition was denied and judgment issued as a mandate on May 7, 1993.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1) where cases in the courts of appeals may be reviewed by the United States Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) An interpretation of the case styled *Bowen, Secretary of HHS v. City of New York, et al.*, 476 U.S. 467, 106 S. Ct. 2022 (1986).

(b) An interpretation of 42 U.S.C. § 300aa-12(e)(1), **Court Jurisdiction,** which states in pertinent part "**(e) Action by United States Court of Federal Claims**, upon issuance of the special master's decision, the parties shall have 30 days to file with the

Clerk of the United States Federal Court of Claims a motion to have the court review the decision . . . ."

(c) An interpretation on RUSCC, Appendix J, Vaccine Rule 11(a), **Judgment,** which states in pertinent part "**(a) In Absence of Motion for Review**. In the absence of the filing of a motion for review within 30 days of the filing of the special master's decision . . . the clerk shall forthwith enter judgment in accordance with the special master's decision".

(d) An interpretation of RUSCC, Rule 60(b), **Relief from Judgment or Order.** (As this provision is lengthy, the pertinent text will be set forth in the Appendix hereto, page 35a.)

(e) The Fifth Amendment to the United States Constitution which states in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

On June 28, 1988, at the age of five months, Crystal Renee Miller received her first DPT vaccination. Less than 24 hours later, the child was discovered dead in her crib after being unobserved for over two hours. The autopsy results indicated her cause of death as Sudden Infant Death Syndrome (SIDS).

On June 4, 1990, Dawn Widdoss, both individually and as administratrix of the deceased, timely filed a petition for compensation for Crystal's death under the National Childhood Vaccine Injury Act (42 U.S.C. § 300aa-1 *et seq.*). Widdoss alleged that Crystal had died as a result of suffering a table injury known as

"shock-collapse or hypotonic-hyporesponsive collapse" (HHE).

Widdoss' case was immediately assigned to Special Master Wright, whose statutory 240-day period in which to conclude the case would have expired on January 30, 1991. However, pursuant to 42 U.S.C. § 300aa-12(d)(3)(C), Special Master Wright granted one 30-day suspension in the proceedings prior to the January 25, 1991 evidentiary hearing and one 30-day suspension thereafter to permit the parties to file post-hearing papers. During the post-hearing period in which she was to decide the case and issue her opinion, Special Master Wright, on March 28 and May 22, 1991, further suspended the proceedings for 60 and 7 days, respectively, (whereby, such suspensions somewhat overlapped) extending her 240-day statutory deadline to June 3, 1991.

Without issuing her decision by June 3, 1991, Special Master Wright, nevertheless, granted the Respondent a final suspension of 14 days on June 6 in an apparent attempt to retain the authority to issue her decision, which she did on June 7, 1991. However, in calculating the applicable and excludable time periods, both the final suspension and the decision issued beyond the 240 day deadline and the decision also issued during the 14-day suspension of June 6, 1991 to June 20, 1991. (*See* Appendix, at page 50a.)

On the merits, Special Master Wright stated this case was an issue of first impression and determined that Widdoss had failed to prove by preponderant evidence that Crystal's death was a sequela of a table injury. This determination was based in part on the fact that Crystal failed to exhibit any clear symptoms of an HHE other than as part and parcel of the agonal process of death: "To say that death is a sequela of a shocklike state that is an integral part of the dying process simply defies logic." *Widdoss v. Secretary, Dep't of Health & Human Servs.*, No. 90-486V, slip op. at 11 (Cl. Ct. Sp. Mstr. June 7, 1991).

On July 9, 1991, 31 days after the special master's decision of June 7, 1991 (but 28 days after actual receipt of the decision by petitioner's counsel by Federal Express mail of June 11, 1991), Widdoss filed her motion to review the special master's decision with the Claims Court. As a result of the alleged untimely filing, on that same date, the clerk of the Claims Court *sua sponte* entered final judgment in accordance with the special master's decision as mandated by 42 U.S.C. § 300aa-12(e)(3).

In response to the Claims Court's adverse judgment, Widdoss submitted a motion for reconsideration of the clerk's entry of judgment, urging that the Claims Court vacate the judgment and review the merits of the case. On November 21, 1991, the Claims Court granted Widdoss' motion "in the interest of justice." *Widdoss v. United States*, No. 90-486V, at 3 (Cl. Ct. Nov. 21, 1991) (*See* Appendix pages 36a-49a.)

In so doing, the Claims Court addressed three argued bases on which to vacate the entry of judgment. First, the judge concluded that the June 6, 1991, suspension order pursuant to RUSCC, Appendix J, Vaccine Rule 9,[2] "[suspending] proceedings on the petition" for 14 days had tolled the running of the 30-day period in which to file a motion for review until after the expiration of the suspension period on June 20, 1991. The court reasoned that "no steps could be lawfully taken during the pendency of the suspension" and, therefore, the June 7, 1991 decision "issued" within the meaning of § 300aa-12(e)(1) on June 20. *Widdoss, supra*, at Appendix, page 45a. Second, in the alternative, even if the suspension period had not tolled the 30-day period, relief was appropriate under Rule 60(b) of the Rules of the United States

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2. Vaccine Rule 9 reads in pertinent part: "(a) *General.* On the motion of a party, for good cause shown, the special master may suspend proceedings on the petition .... (b) *Effect.* Such periods of suspension shall be excluded for purposes of the time limitations of 42 U.S.C. Section 300aa-12(d)(3) and Vaccine Rules 4(b) and 10".

Claims Court (RUSCC), because such relief would be "in accordance with the spirit and purpose of the Vaccine Act." *Widdoss, supra,* at Appendix, page 47a quoting *Zimmerman v. Secretary, Dep't of Health & Human Servs.*, No. 90-2758V, 1991 WL 211926, at *3 n. 2 (Cl. Ct. Sept. 27, 1991) (order granting motion to reinstate petition).

However, the court did determine that the three-day deadline extension afforded by RUSCC 6 and RUSCC, Appendix J, Vaccine Rule 19(c), available in situations where papers are served by mail, had no application to the 30-day period for filing a motion for review, since the period ran from the date of issuance of the special master's decision under 42 U.S.C. § 300aa-12(d), regardless of whether or when the petitioner received a copy of the decision through the mails. *Widdoss, supra,* at Appendix, 48a.

On the merits, the Claims Court reversed the special master's decision, holding that the special master had ignored unrebutted testimony on the existence of symptoms of an HHE, in light of which Widdoss had demonstrated by preponderant evidence that Crystal had suffered an HHE and that she was, therefore, entitled to compensation for Crystal's death. *Widdoss v. Secretary, Dep't of Health & Human Servs.*, 25 Cl. Ct. 251 at 263-68 (1992).

The Secretary of the Department of Health and Human Services appealed to the United States Court of Appeals for the Federal Circuit from both the November 21, 1991 order of the United States Claims Court vacating the judgment entered in accordance with the special master's decision, and the Claims Court's February 6, 1992 opinion and judgment reversing the special master's decision, and compensating Dawn R. Widdoss (Widdoss) under the Vaccine Injury Act for the death of her daughter.

However, upon appeal, because Widdoss' motion to review

the special master's decision was allegedly untimely, the Court of Appeals held the Claims Court lacked jurisdiction to entertain the motion to reconsider under RUSCC, Rule 60(b) and then rule upon the merits as a result of the untimely filing of the motion for review. The Court of Appeals vacated the Claims Court's order and judgment and remanded with instructions to enter judgment in accordance with the special master's decision which denied benefits.

B. The Basis of Federal Jurisdiction in the Court of First Instance.

Pursuant to 42 U.S.C. § 300aa-12(a), the United States Claims Court and the United States Claims Court special masters shall have jurisdiction over proceedings to determine if a petitioner, under 42 U.S.C. § 300aa-11, is entitled to compensation under the National Childhood Vaccine Program. Further, the United States Court of Appeals for the Federal Circuit had jurisdiction over the appeal pursuant to 42 U.S.C. § 300aa-12(f).

REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10, the Petitioner respectfully submits the United States Court of Appeals for the Federal Circuit has decided the jurisdictional issue in conflict with other courts of appeals and this Honorable Court and, further, this is an important question of federal jurisdictional law which should be settled by this Court.

In a nutshell, the Court of Appeals held that the Claims Court did not have jurisdiction to grant Petitioner's RUSCC Rule 60(b) motion because only a timely filed motion for review of the master's decision can trigger the Claims Court's jurisdiction. Without such a timely filing, the Claims Court was without jurisdiction to take any such action. Such a holding should be set aside for several reasons.

As stated by Claims Court Judge Gibson in his opinion and order filed November 21, 1991, the "court's allowance of a motion for relief similar to RUSCC 60(b) is clearly allowable under the Vaccine Rules and in accordance with the spirit and purpose of the Vaccine Act" (citing *Zimmerman v. Secretary of Department of HHS*, 90-2758V (Cl. Ct. September 27, 1991) n. 2 as referenced in Appendix at page 47a).

In addition, the Petitioner respectfully submits the jurisdictional argument became moot when the Claims Court took jurisdiction of the case pursuant to 42 U.S.C. § 300aa-12(e)(3) and entered its judgment on July 9, 1991, dismissing the petition.

The concurring/dissenting opinion of the Court of Appeals makes clear that whether a requirement is described as "jurisdictional" does not prohibit recourse to the interest of justice and does not bar equitable tolling or waiver should the circumstances warrant. (*See* Appendix at page 21a.)

Indeed, even the majority opinion of the Court of Appeals indicates that the Claims Court has the jurisdiction to determine if it has jurisdiction. (*See* Appendix at page 14a.) This is precisely what was done by the Claims Court in ruling upon the Petitioner's Motion under RUSCC, Rule 60(b). If Rule 60(b) is inappropriate, the Court of Appeals has failed to state under what statute or rule this can be done . . . especially since it declined to interpret the Motion to Reconsider as anything other than a motion to extend the time period in which to file (See Appendix at page 16a).

Pursuant to the decision of this Honorable Court in *Bowen, Secretary of HHS v. City of New York, et al.*, 476 U.S. 467, 106 S. Ct. 2022 (1986), it was held that the 60-day time period in which to file for judicial review in federal district court of the Secretary's final decision for the denial of social security benefits was not jurisdictional but rather constituted a statute of limitations which can be equitably tolled. (*See* 476 U.S. 467, 476-478.)

The equities in the case *sub judice* include *inter alia* the final 14-day suspension entered by the special master on June 6, 1991, was already beyond the 240 day time limit; if effective, Petitioner's counsel reasonably relied in calculating the 30-day period to begin on June 21, 1991 (after the suspension expired); the master's failure to render her decision within 240 days as required by 42 U.S.C. § 300aa12(g), Petitioner and her counsel not being in actual receipt of the master's decision until June 11, 1991 which caused the Petitioner to lose four days of response time; the motion for review being placed in the mail on July 3, 1991 (five full days before it was allegedly due); no prejudice to the government in the alleged untimely filing of the motion for review; and the SIDs issue on the merits being an important one which should not be denied review.

As stated by the Court in *Bowen, supra,* statutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" [citing *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554, 94 S. Ct. 746, 766, 38 L. Ed. 2d 713 (1974)]. In the instant case, the filing of the motion for review [allegedly one (1) day late] certainly was not the type of filing that came as a surprise or was done in such a fashion as to revive a stale claim where evidence could no longer be mustered.

Further, as heretofore stated, the confusion regarding the filing deadline was caused by the special master herself by failing to issue her decision by June 3, 1993, and then issuing a 4-day suspension of all proceedings on June 6, 1991; and, thereupon, issuing her decision on June 7, 1991 and without making any reference to the effect of her suspension.

Also, it cannot be said that Petitioner and counsel were not diligent since a comprehensive motion for review was researched, drafted, re-drafted, typed, copied, collated and placed in the mail

on July 3, 1991, all within twenty-three (23) days from the receipt of the decision on June 11, 1991.

The Petitioner submits a few of the aforementioned equities in the case warrant some additional consideration as they relate to the jurisdictional issue.

A. Master's 14 day Suspension

As noted by Claims Court Judge Gibson in his opinion and order, not only did the special master issue her decision "notwithstanding the foregoing suspension of proceedings [,] [w]hat is more surprising is the fact that the special master failed to vacate said suspension or make any reference to its efficacy in her decision on the merits." (*see* Appendix at page 43a).

As the suspension was never vacated by an order of the Special Master, it is submitted it remained efficacious until June 20, 1991 when it ran its course. Since the 30-day period did not commence to run until June 21, 1991, the filing of the motion for review on July 9, 1991 was clearly timely.

While the Court of Appeals ruled that a master's suspension(s) of vaccine proceedings serve only to mitigate the overall 240-day statutory deadline within which the special master must resolve the petition, this is not so.

The special effect of RUSCC, Appendix J Vaccine Rule 9(b) indicates that "such periods of suspension shall be excluded for purposes of time limitations of 42 U.S.C. Section 300aa12(d)(3) and Vaccine Rule 4(b) and 10."

42 U.S.C. § 300aa-12(d)(3) delineates various functions of the special master which includes issuing a decision on a petition. RUSCC, Appendix J, Vaccine Rule 10 indicates when the special

master shall issue a final decision determining whether or not an award of compensation is made.

As a result, the Petitioner respectfully submits the result of the suspension was that the master's decision could not have been effective until June 21, 1991 and, in turn, the court's ability to enter a judgment could not have been effective until July 22, 1991. The judgment of July 9, 1991, is void or voidable, as the Claims Court was without jurisdiction to enter the judgment until thirty (30) days after the suspension period expired.

B. Relief Under RUSCC Rule 60(b)

As noted in Rule 60(b) of RUSCC, the Claims Court is permitted to relieve a party from judgment upon various reasons including: "(1) mistake, inadvertence, surprise or excusable neglect . . . (4) the judgment is void . . . (6) any other reason justifying relief from operation of the judgment." The Petitioner respectfully submits all three (3) reasons apply in the instant case.

As stated by Judge Gibson below:

> The unorthodox and unexplained nature of the special master's decision to suspend the proceedings for 14 days and then on the following day to dismiss the case without addressing the pending suspended period created a confusing scenario to which Petitioner could clearly be prone to honestly believe a 14-day tolling occurred.

(*See* Appendix at page 48a.)

In addition, it cannot be forgotten that Petitioner's counsel did act with due diligence in that a comprehensive and detailed motion for review was prepared and placed in the United States mail on

July 3, 1991, five (5) full days prior to the alleged July 8, 1991 deadline. There is no reason why Petitioner's counsel should be charged with the knowledge that the motion for review would not have been received by the clerk's office on July 8, 1991 although, as stated, Petitioner's counsel initially relied upon the deadline being either July 11, 1991 or July 22, 1991.

In addition to the relief by way of mistake, inadvertence, surprise or excusable neglect, the Petitioner also argues the judgment is void for the reasons hereinabove stated as they relate to the issuance of the master's decision and order during the 14-day suspension period and after the 240-day period.

Also, the Petitioner submits there is a persuasive and timely showing of other reasons justifying relief from the operation of the judgment when one considers the policy to be furthered by RUSCC, Rule 60(b), such policy being stated by Claims Court Judge Gibson:

> It can therefore be stated that RUSCC 60(b) "seeks to strike a delicate balance between . . . the desire to preserve the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." Moreover, it is "a grand reservoir of . . . power to do justice in a particular case, that may be tapped by the . . . . court in the sound exercise of its discretion, and within the structure inherent in the underlying objectives of the rule." (citations omitted.) Moreover, the Court in *Primbs* noted that "strong policies . . . favor the resolution of disputes on their merits." (citation omitted.) In addition, when the judgment being attached is a default judgment, "Rule 60(b) will be liberally

> construed in favor of trial on the full merits of the case" (citations omitted).

(*See* Appendix at page 47a.)

Finally, as earlier stated, even the majority opinion of the Court of Appeals states "the jurisdictional character of the 30-day time period does not preclude the Claims Court from adjudicating the question of whether Widdoss' petition for review was timely filed, however" (*See* Appendix at page 14a). Then, in footnote 7 of the opinion the Majority states "the facts of the case indicate that judgment was entered . . . solely as a result of Widdoss' failure to file within the 30-day period. As such, we decline to interpret Widdoss' motion as anything other than a motion to extend the time period in which to file." (*See* Appendix at page 16a). The concurring/dissenting opinion states "I agree that the untimely filing cannot be overcome by Rule 60(b)." (*See* Appendix at page 18a.)

Apparently, the Court of Appeals seems to infer there may be other avenues of attack other than Rule 60(b) but is reluctant to state what they are.[3] If another rule or statute applies, the court should say so rather than have Petitioner guess what that is.

C. Thirty (30) Days From "Filing" vs. "Issuance"

It is respectfully submitted to calculate the thirty (30) day time

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3. If the Court of Appeals is suggesting RUSCC, Rule 59, is such an avenue (**"New Trials; Rehearings; Amendment of Judgments"**), the Petitioner's imprecisely drafted "Motion for Reconsideration" filed with the Claims Court within ten (10) days and was argued by the Respondent to be such a Rule 59 motion and it was the Claims Court which deemed the motion to be a Rule 60(b) motion. (*See* Appendix at pages 38a-39a.) Further, the fact that the motion should be deemed either a Rule 59 or a Rule 60 motion was briefed by the parties prior to the Claims Court rendering its decision to grant the motion.

period in which to file a motion for review from the filing date of the special master's decision denies the Petitioner the full time in which to act — especially when the applicable statute and rule use different terms subject to different interpretations.

In the case at bar, the decision of the special master filed on June 7, 1991, did not reach the offices of Petitioner's counsel until four (4) days later on June 11, 1991, at 9:47 a.m. This was confirmed by a letter received from Federal Express, dated July 19, 1991, which was filed with the Office of the Clerk.

However, a review of 42 U.S.C. § 300aa-12(e)(1) indicates that "[u]pon *issuance* of the special master's decision, the parties shall have thirty (30) days to file with the Clerk of the United States Claim Court a motion to have the Court review the decision". (emphasis supplied). This language is different than the language of RUSCC, Appendix J, Vaccine Rule 11(a) which requires "the filing of a Motion for Review within 30 days of the *filing* of the special master's decision . . ." (emphasis supplied).

As has been held, the "issuance" of an order of an administrative agency requires knowledge of the substance of the order. [*See Palisades Citizen Association v. District of Columbia Alcoholic Beverage Control Board,* 324 A.2d 692 (1974)]. In the instant case, the Petitioner and counsel did not have knowledge of the substance of the special master's decision until it was mailed by the Clerk of the Claims Court on June 10, 1991, (by Federal Express overnight mail) and actually received by Petitioner's counsel on June 11, 1991.

In a case styled *Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board et al.,* 156 Cal. Rptr. 152 (1979) the court was asked to construe the California's Agricultural Labor Relations Act. The Act, Labor Code § 1160.8, provided that an employer's petition for review "shall be filed with the Court within

thirty (30) days from the date of the issuance of the Board's Order". (*See* 156 Cal. Rptr. at 155.)

In the *Sunnyside* case, the court construed the word of "issuance" as follows:

> The generally accepted meaning of the terms "issue" and "issuance" is to "send forth; to emit; to promulgate; . . . put into circulation ...' (See Black's Law Dic. (4th rev. ed. 1968), page 964, col. 2; 22A Words and Phrases (1958) page 530. The legislative choice of the word "issuance" reasonably indicates that something more than 'signing" or "filing" of the Board's Order was intended. We hold that "issuance" of the Board's Order occurred when it was mailed to Sunnyside.

(*See* 156 Cal. Rptr. at 155.)

Accordingly, using this rationale, the special master's decision was not "issued" [under 42 U.S.C. § 300-aa-12(e)(1)] until June 10, 1991, when it was given to Federal Express for overnight delivery on June 11, 1991. If so, the instant petition for review, filed on July 9, 1991, was timely.

D. Three-Day, Service-by-Mail, Extension

Further, while Claims Court Judge Gibson did not accept the alternative argument that Petitioner should have available the benefit of the 3-day, service-by-mail, extension, the Petitioner respectfully submits such alternative argument also supports her position.

Pursuant to RUSCC, Appendix J, Vaccine Rule 19(c) there is additional filing time after service by mail as follows:

> Whenever a party has the right or is required to do some act within a prescribed period after service of a paper and the service is made by mail, three (3) days shall be added to the prescribed period (unless the special master orders otherwise).

Further, RUSCC, Rule 6(c) has the same language in regard to the additional three (3) day service-by-mail extension.

Still further, pursuant to RUSCC Rule 77(j), the clerk of the court is to immediately serve notice of the entry of any order or judgment as provided by Rule 5. RUSCC, Rule 5 states such notice is to be mailed. Since there is no specific Vaccine Rule as to how the master's decision is to be communicated to counsel, it was obviously contemplated this would be done by mail and, if so, the 3-day extension would apply.

Accordingly, with the addition of three (3) days, the motion for review would not have been due until July 11, 1991 so that is filing on July 9, 1991 was timely.

It is respectfully submitted that to compute the thirty (30) day appeal period from the filing date of the special master's decision and order in unfair and inequitable on the facts of this (or any) case since such interpretation has denied the Petitioner the full thirty (30) day appeal period to which she should be entitled.

In other words, the Court of Appeal's position, when taken to its logical extreme, would be that if, for some reason, the special master's decision and order had not reached Petitioner's counsel until the twenty-ninth (29th) day of the thirty (30) day appeal period, Petitioner's counsel would still have been required to file the motion for review within one (1) day. Further, the court would then also uphold a judgment being entered, all without any relief

available to the Petitioner, since the Claims Court would not have jurisdiction.

Obviously, this is not what was intended by the rules and that is specifically why provisions for additional three (3) days were added, *i.e.*, this affords a party the full thirty (30) day time period in which to act.

E. Violation of Due Process

In the instant case, it is uncontroverted that the special master's decision was held by the Office of the Clerk for three days until it was mailed by Federal Express overnight mail on June 10, 1991, and received on June 11, 1991. The delay is mailing notice of this decision was not only contrary to RUSCC, Rule 77(j), but also deprived the Petitioner-Appellee the full thirty (30) day time period in which to act and, indeed, this was a critical delay inasmuch as the motion for review was allegedly filed only one date late.

In a case styled *Marshall Durbin Farms. Inc. v. National Farmers Org. Inc.*, 446 F.2d 353 (5th Cir. 1971), a preliminary injunction was issued on June 18, 1970 and a hearing scheduled on June 25, 1970. The defense requested a continuance of the hearing because it was a complicated case. This request was denied because the federal rules required a hearing in five days. On appeal, the Circuit Court of Appeals reversed on the basis that the defense did not have an adequate opportunity to prepare and present a defense irrespective of the rules time requirement. While the facts of the case are dissimilar, the theory of due process is the same, *i.e.*, sometimes compliance with the rules deprives due process, especially when a party is not given a full opportunity in which to act.

It is interesting that the RUSCC rules require items to be in

hand at the clerk's office for them "to count" [*see* RUSCC, Rule 5 and RUSCC, Appendix J, Vaccine Rule 17(a)] and this is for good reason. However, that same rationale of having things "in hand" (which permit a party to be aware of same with the full opportunity to respond to same) doesn't seem to work in the reverse for a Petitioner's right to act.

CONCLUSION

The 30-day time limit is inapplicable; not only for the reasons that it is not jurisdictional, but also because, in this case, it should not even apply as the 14-day suspension was in effect. Alternatively, as the 14-day suspension of June 6, 1991 and the special master's decision of June 7, 1991, were both beyond the 240- day time limit, the master had no power to do either act until the master issued appropriate notices under 42 U.S.C. § 300aa-12(g) so that the judgment entered thereon is void or voidable. Also, the equities of the case permit application of RUSCC, Rule 60(b) or a tolling or waiver of the period in question.

Further, to calculate the 30-day time limit from the time the Petitioner actually received notice of the master's decision more comports with due process and permits the Petitioner the full time in which to act. This is no uncertainty or guesswork regarding such a calculation and it can easily be ascertained from the mailing date.

The SIDs issue in this case is an important one (one of first impression as stated by the special master) and should not be denied review on the merits. It is respectfully submitted the decision of the Court of Appeals be reversed and the matter remanded to that court for argument on the merits.

Respectfully submitted,

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Dated: June 21, 1993

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED MARCH 24, 1993 (WITH ERRATA SHEET)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5096

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

Petitioner-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

Ronald J. Karasek, Zito, Martino & Karasek, of Bangor, Pennsylvania, argued for petitioner-appellee.

Mary Hampton Mason, Attorney, Department of Justice, of Washington, D.C., argued for respondent-appellant. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General, *Helene M. Goldberg* and *John Lodge Euler*.

Appealed from: U.S. Court of Federal Claims

Judge Gibson

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5096

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

Petitioner-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

DECIDED: March 24, 1993

Before NEWMAN, MICHEL and CLEVENGER, *Circuit Judges.* CLEVENGER, *Circuit Judge.*

The Secretary of the Department of Health and Human Services appeals from both the November 21, 1991 order of the United States Claims Court vacating the judgment entered in accordance with the special master's decision, and the Claims Court's February 6, 1992 judgment, *Widdoss v. Secretary, Dept of Health & Human Servs.*, 25 Cl. Ct. 251 (1992) (Gibson, J.), reversing the special master's decision and compensating Dawn R. Widdoss (Widdoss) under the National Childhood Vaccine Injury Act for the death of her daughter, Crystal Renee Miller, less than 24 hours after being vaccinated with diphtheria-pertussis-tetanus (DPT). Because Widdoss' motion to review the special master's decision was untimely, the Claims Court lacked jurisdiction to entertain and rule upon the merits of that motion. Consequently, we

vacate the Claims Court's order and judgment and remand with instructions to enter judgment in accordance with the special master's decision.

I

This appeal raises three issues: (i) whether a special master's decision issued during a period of suspension under 42 U.S.C. § 300aa-12(d)(3)(C)[1] is "issued" for the purpose of triggering the 30-day period in which to file a motion in the United States Claims Court to review the special master's decision under 42 U.S.C. § 300aa-12(e)(1); (ii) whether the 30-day period under section 300aa-12(e)(1) is jurisdictional; and (iii) whether the Claims Court has the authority to waive compliance with the 30-day period through use of its rules of procedure.

Statutory Framework

The National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660 (Title III), 1986 U.S.C.C.A.N. (100 Stat.) 3755 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-34 (1988 & Supp. 1990) & at 42 U.S.C.A. §§ 300aa-1 to 300aa-34 (West 1991 & Supp. 1992)) (Vaccine Act), provides that compensation is available on petition to the Claims Court to a claimant who demonstrates by preponderant evidence that, *inter alia*, the vaccinated child suffered one of four statutorily-defined "table" injuries, or a complication or "sequela" thereof. 42 U.S.C. §§ 300aa-13(a)(1), 300aa-14(a), (b) (1988 & Supp. 1990).

The legislative history accompanying the original statute evidences a concern with rapid resolution of petitions:

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1. Unless otherwise specified, 42 U.S.C. cites appear in (Supp. 1990).

Appendix A

> The entire proceeding — from date of filing through Special Master proceedings and court review — is to take place *as expeditiously as possible* . . . . [M]uch of the equity in limiting compensation and limiting other remedies arises from the *speed and reliability* with which the petitioner can expect judgment; without such *quick and certain* conclusion of proceedings, the compensation system would work an injustice upon the petitioner.

H.R. Rep. No. 908, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6358 (emphasis added).

Under 42 U.S.C. § 300aa-12(d)(3)(A)(ii), originally enacted as subsection 2112(d) of the Vaccine Act, § 311(a), 1986 U.S.C.C.A.N. (100 Stat.) at 3762, the special master assigned to hear a petition has a limited period of 240 days after the petition's filing date in which to hear the merits and issue a decision. If the special master fails to issue a decision within 30 days after expiration of the 240-day period, the special master loses jurisdiction over the case. 42 U.S.C. §§ 300aa-12(g), 300aa-21(b)(2).

Pursuant to 42 U.S.C. § 300aa-12(d)(3)(C), however, the special master may, upon motion of either party, toll the 240-day period for an aggregate period not to exceed 150 days. Section 300aa-12(d)(3)(C) was added by the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 6601(g), 1989 U.S.C.C.A.N. (103 Stat.) 2106, 2289, the accompanying House Conference Report of which reads, in part:

> [The Act permits] a suspension of time during the proceedings that is not to count in the

> aggregate time [of 240 days] allowed for compensation actions to proceed. . . . *If* the [special] master determines that *further time is necessary for the action on the petition to proceed,* the [special] master is . . . authorized to allow . . . suspensions, [with] the aggregate [suspension] period not to exceed 150 days in total.

H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 516 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3119 (emphasis added). This concern was further evidenced by the addition one year later of 42 U.S.C.A. § 300aa-12(d)(3)(D) (West Supp. 1992),[2] which permits the chief special master, acting on his own initiative "in the interest of justice," to suspend proceedings associated with pre-September 30, 1990 vaccinations for a period of up to 540 days in addition to the 150-day suspension time under section 300aa-12(d)(3)(C), upon determining that "the number of filings and resultant workload place an undue burden on the parties or the special master involved in [the] proceedings." *Id.* Neither of these suspension provisions was intended to contravene the Vaccine Act's desire to resolve petitions rapidly, but instead resulted from the recognition that special masters assigned to hear individual cases may become so overburdened with the enormity of the caseload that they would be unable to deal properly with each case. *See* 42 U.S.C.A. § 12(d)(3)(D) (West 1991 & Supp. 1992); 136 Cong. Rec. H9728 (daily ed. Oct. 15, 1990) (Joint Statement of

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2. Section 300aa-12(d)(3)(D) was added by the Vaccine & Immunization Amendments of 1990, Pub. L. No. 101-502, § 5(b)(1), 1990 U.S.C.C.A.N. (104 Stat.) 1285, 1286, and was amended by the Health Information, Health Promotion, & Vaccine Injury Compensation Amendments of 1991, Pub. L. No. 102-168, § 201(c), 1991 U.S.C.C.A.N. (105 Stat.) 1102, 1103.

Explanation of Amendments case would have expired on January 30, 1991. Pursuant to section 300aa-12(d)(3)(C), however, Special Master Wright granted one 30-day suspension in the proceedings prior to the January 25, 1991 evidentiary hearing, and one 30-day suspension thereafter to permit the parties to file post-hearing papers. Wright thereby extended the deadline for issuing her decision through March 31, 1991. During the post-hearing period in which she was to decide the case and issue her opinion, Special Master Wright, on March 28 and May 22, 1991, further suspended the proceedings for 60 and 7 days, respectively, thereby further extending her 240-day statutory deadline to June 6, 1991. Wright granted a final suspension of 14 days on June 6 in order to retain the authority to issue her opinion, which she did on June 7, 1991. Each extension of time was granted pursuant to a request by one of the parties.

On the merits, Special Master Wright determined that Widdoss had failed to prove by preponderant evidence that Crystal's death was a sequela of a table injury. This determination was based in part on the fact that Crystal failed to exhibit any clear symptoms of an HHE other than as part of the agonal process of death: "To say that death is a sequela of a shock-like state that is an integral part of the dying process simply defies logic." *Widdoss v. Secretary, Dep't of Health & Human Servs.*, No. 90-486V, slip op. at 11 (Cl. Ct. Sp. Mstr. June 7, 1991).

On July 9, 1991, 31 days after the special master's decision issued, Widdoss filed her motion to review the special master's decision with the Claims Court. As a result of the untimely filing, on that same date, the clerk of the Claims Court *sua sponte* entered final judgment in accordance with the special master's decision as mandated by 42 U.S.C. § 300aa-12(e)(3).

Appendix A

In response to the Claims Court's adverse judgment, Widdoss submitted a motion for "reconsideration" of the clerk's entry of judgment, urging that the Claims Court vacate the judgment and review the merits of the case. On November 21, 1991, the Claims Court granted Widdoss' motion "in the interest of justice." *Widdoss v. United States*, No. 90-486V, at 3 (Cl. Ct. Nov. 21, 1991) (order vacating judgment).

In so doing, the Claims Court addressed three argued bases on which to vacate the entry of judgment. First, the judge concluded that the June 6, 1991 order pursuant to Vaccine Rule 9,[3] "[suspending] proceedings on the petition" for 14 days, had tolled the running of the 30-day period in which to file a motion for review until after the expiration of the suspension period on June 20, 1991. The court reasoned that "no steps could be lawfully taken during the pendency of the suspension" and therefore the June 7, 1991 decision "issued" within the meaning of section 300aa-12(e)(1) on June 20. *Id.* at 7-8. Second, in the alternative, even if the suspension period had not tolled the 30-day period, relief was appropriate under Rule 60(b) of the Rules of the United States Claims Court (RUSCC), because such relief would be " 'in accordance with the spirit and purpose of the Vaccine Act.' " *Id.* at 8 (quoting *Zimmerman v. Secretary, Dept of Health & Human Servs.*, No. 90-2758V, 1991 WL 211926, at *3 n.2 (Cl. Ct. Sept. 27, 1991) (order granting motion to reinstate petition)). Finally, the court determined that the three-day deadline extension afforded by RUSCC 6 and Vaccine Rule 19(c), available in situations where papers are served by mail, had no application to the 30-day period

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3. Vaccine Rule 9 reads, in pertinent part: "(a) *General.* On the motion of a party, for good cause shown, the special master may suspend proceedings on the petition. . . . (C) *Effect.* Such periods of suspension shall be excluded for purposes of the time limitations of 42 U.S.C. § 300aa-12(d)(3). . . ."

for filing a motion for review, since the period ran from the date of issuance of the special master's decision under 42 U.S.C. § 300aa-12(d), regardless of whether the petitioner received a copy of the decision through the mails. *Id.* at 9.

On the merits, the Claims Court reversed the special master's decision, holding that the special master had ignored unrebutted testimony on the existence of symptoms of an HHE, in light of which Widdoss had demonstrated by preponderant evidence that Crystal had suffered an HHE, and that she was therefore entitled to compensation for Crystal's death. *Widdoss v. Secretary, Dep't of Health & Human Servs.*, 25 Cl. Ct. 251, 263-68 (1992).

II

Review of whether the Claims Court had jurisdiction to hear the motion to review the special master's decision is *de novo*. *Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992); *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986). This decision necessarily involves statutory interpretation, which we likewise review *de novo*. *Commercial Energies, Inc. v. United States*, 929 F.2d 682, 684 (Fed. Cir. 1991); *Pasteur v. United States*, 814 F.2d 624, 626 (Fed. Cir. 1987).

A

Section 300aa-12(d)(3) authorizes the special master to toll or "suspend" the time period in which she must decide the case upon motion of either party. The actual language of the section reads, in pertinent part:

> (A) A special master to whom a petition has been assigned shall issue a decision on such petition. . . .

> (ii) . . . as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C), after the date the petition was filed.
>
> . . . .
>
> (C) In conducting a proceeding on a petition a special master shall suspend the proceedings one time for 30 days on the motion of either party. After a motion for suspension is granted, further motions for suspension by either party may be granted by the special master, if the special master determines the suspension is reasonable and necessary, for an aggregate period not to exceed 150 days.

42 U.S.C. § 300aa-12(d)(3); *see also* Vaccine Rules 9, 10(a).

In considering the effect of Special Master Wright's June 6 suspension on the issuance of her decision, the Claims Court ruled that the suspension "froze *all* proceedings during that entire [suspension] period to the end that *no* steps could be lawfully taken during the pendency of the suspension." *Widdoss v. United States,* slip op. at 7 (order vacating judgment) (emphasis added). This understanding of the effect of a suspension erroneously limits a special master's power to act during periods of suspension. *See* Vaccine Rule 9(c) (single effect of suspension is to toll statutory time periods), *supra* n.3.

As noted above, the legislative history demonstrates that periods of suspension serve only to enlarge the legally available time period in which to render a decision on a petition. Such extensions are authorized if the special master determines that

"further time is necessary for . . . action on the petition to proceed." H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 516 (1986), *reprinted in* 1989 U.S.C.C.A.N. at 3119. That a special master is able to consider the evidence, decide the case, and prepare her opinion for issuance during periods of suspension thus are unquestionable propositions. Were the law otherwise, the effect, for example, of a 30-day suspension granted on the 240th day would be simply to delay by 30 days the special master's inevitable announcement that she could no longer entertain the petition. This clearly was not intended by Congress.

Futhermore, both sections 300aa-12(d)(3)(A) and 300aa-12(e)(1) evidence that the proceedings on a petition conclude with the special master's final act of "issu[ing] a decision on the petition," at which time the clock measuring the time for filing a motion to review the special master's decision begins to run. Consequently, the effective date of issuance of a decision by the special master has to be the date actually issued, because upon issuance of the decision, the special master thereafter relieved of any further power to suspend the case, since there are no longer any "proceeding[s] on a petition" to suspend under section 300aa-12(d)(3)(C). The June 6, 1991 14-day suspension thus had the *sole* effect of extending the period of time within which the special master could decide the case, since "further time [was] necessary for the action on the petition to proceed." Upon issuing her decision, any remaining suspension period was of no further effect.

Moreover, interpreting the statutory suspension provisions so as to require delaying the effectiveness of the special master's decision until the expiration of the suspension period would be contrary to the legislative history's premium on rapid resolution of petitions for compensation and on avoidance of unnecessary delays within the statutory framework. This emphasis supports

"deciding" a case as soon as possible, and "issuing" the decision as soon as it is made. A clearly expressed purpose of the Vaccine Act was to resolve petitions for compensation "as expeditiously as possible," furtherance of which is accomplished through our interpretation of the special master's power to "suspend" proceedings.

Thus, for purposes of section 300aa-12(e)(1), the special master's decision effectively "issued" on the date it actually issued, regardless of any remaining period of suspension. The 30-day period in which Widdoss could file a motion to review the special master's decision began to run on June 7, 1991.

B

Widdoss' July 9, 1991 motion to review the special master's decision was untimely filed in the Claims Court. We must therefore determine whether the 30-day time limit under section 300aa-12(e)(1) is jurisdictional.

The pertinent section of the statutory compensation scheme, entitled "Court jurisdiction," reads in part:

> (e) Actions by United States Claims Court
>
> (1) *Upon issuance* of the special master's decision, *the parties shall have 30 days to file*[4] with the clerk of the United States Claims Court *a motion* to have the court review the decision. . . .

---

4. A motion is "filed" in the Claims Court when "actually received and marked filed by the clerk, not when mailed." Vaccine Rule 17(a).

> (2) *Upon the filing of a motion* under paragraph (1) with respect to a petition, *the United States Claims Court shall have jurisdiction* to undertake a review of the record of the proceedings and may thereafter [exercise its standards of review].
>
> (3) *In the absence of a motion* under paragraph (1) respecting the special masters decision . . . , the clerk of *the United States Claims Court shall immediately enter judgment* in accordance with the special master's decision.

42 U.S.C. § 300aa-12(e) (emphasis added); *see also* Vaccine Rule 11(a); Vaccine Rule 23 ("No extensions of time under this rule will be permitted, and failure of a party to timely file such a motion shall constitute a waiver of the right to obtain review.").

Congress specifically used this phraseology to illustrate in the strongest possible terms that filing a motion to review the special master's decision within the 30-day period is a prerequisite to the Claims Court's jurisdiction. The pertinent legislative history accompanying the addition of section 300aa-12(e) emphasizes the same notion:

> The conference agreement provides for an appeal of the [special] master's decision to the U.S. Claims Court under very limited circumstances. *If such a motion for review is filed within the applicable time limits,* the Court is *then* to decide to [exercise its standards of review]. . . .

H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 516 (1989), *reprinted in* 1989 U.S.C.C.A.N. at 3119-20 (Report accompanying OBRA §§ 6601(d)-(i), 1989 U.S.C.C.A.N. (103 Stat.) at 2286-90).

That Congress may declare as jurisdictional statutory time periods in which to appeal is a proposition clearly established in the case law. *See, e.g., Butler v. Derwinski*, 960 F.2d 139, 141 (Fed. Cir. 1992) (38 U.S.C.A. § 7266(a) (West 1991): 120-day period in which to appeal to the Court of Veterans Appeals; the court "simply cannot evade Congress's limitation upon its jurisdiction by furnishing an extension which Congress had not empowered it to provide."); *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 430 (Fed. Cir. 1989) (5 U.S.C. § 504(c)(2) (1982 & Supp. 1986): 30-day period in which to appeal from Armed Services Board of Contract Appeals' decision); *Kelley v.Secretary, United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (19 U.S.C. § 2395(a) (1982): 60-day period from notice of final decision of Secretary of Labor in which to commence action in the Court of International Trade); *Monzo v. Department of Transp., Fed. Aviation Admin.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984) (5 U.S.C. § 7703(b)(1) (1982): 30-day period in which to appeal from Merit Systems Protection Board's decision); *Placeway Constr. Corp. v. United States*, 713 F.2d 726, 728 (Fed. Cir. 1983) (41 U.S.C. § 607(g)(1)(A) (1982): 120-day period in which to appeal from Board of Contract Appeals' decision); *see also Schacht v. United States*, 398 U.S. 58, 68 (1970) (Harlan, J., concurring) (U.S. Supreme Court treats time requirements imposed by statute as jurisdictional); *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 408 (Fed. Cir. 1989) (Nies, J., concurring in result) ("A time limit fixed by statute within which to file a motion is a *jurisdictional* restriction." (emphasis in original)).

Moreover, the jurisdictional nature of 42 U.S.C. § 300aa-

12(e)(1) was addressed in *Wilson v. Secretary, Dep't of Health & Human Servs.*, 23 Cl. Ct. 169 (1991), *aff'd*, No. 91-5123 (Fed. Cir. Mar. 13, 1992) (table). In *Wilson*, which was summarily affirmed without opinion by this court, petitioners withdrew their motion to review a special master's decision prior to any action thereon by the Claims Court, and judgment was thereafter entered on the basis of the special master's decision without reaching the merits thereof. *Id.* at 170. Petitioners thereafter attempted to invoke RUSCC 59 to obtain post-judgment relief. Due to the petitioners' failure to pursue pre-judgment remedies, the Claims Court concluded that it lacked jurisdiction over the case, since any jurisdiction had been lost upon the original motion's withdrawal. Though Widdoss would have us limit *Wilson* to its facts, we read the case to stand for the broader principle that the Claims Court's jurisdiction to hear appeals under the Vaccine Act is "unambiguously circumscribed by the plain language of [section 300aa-12(e)]." *Id.* at 171.

In light of the above, we hold that the 30-day time period in which to file a motion for review under section 300aa-12(e)(1) is jurisdictional. The jurisdictional character of the 30-day time period does not preclude the Claims Court from adjudicating the question of whether Widdoss' petition for review was timely filed, however. *See* 42 U.S.C. § 300aa-12(e)(3). The Claims Court obviously has jurisdiction to determine if it has jurisdiction. *Johns-Manville Corp. v. United States*, 893 F.2d 324, 328 (Fed. Cir. 1989); *cf. C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 877 (Fed. Cir. 1983) (Federal Circuit has inherent jurisdiction to determine its own jurisdiction); *see also Spruill v. Merit Sys. Protection Bd.*, 978 F.2d 679, 686-89 (Fed. Cir. 1992) (& cases cited therein).

C

Because the 30-day time period is jurisdictional, invocation of RUSCC 60(b) to authorize review of the merits of Widdoss' petition for review is to no avail, because such a rule cannot be used to escape a jurisdictional limitation. RUSCC 60(b) reads, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

RUSCC 60(b) was promulgated by the Claims Court under authority conferred thereon by Congress to govern practice and procedure in matters before the court. 28 U.S.C. § 2503(b) (1988). Although the Rule's language would at first glance apparently apply to the immediate issue, it is well settled that "[a]n authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge its jurisdiction[.]"[5] *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941). Moreover, it is clear that "the [Claims Court] cannot, through its [acknowledged] rule-making power, expand its jurisdiction beyond the limits prescribed by Congress." *RSH Constructors,*

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5. We also note that on this basis, the Claims Court would be unable to rely on the "good cause" standard of Vaccine Rule 19(b) to waive the jurisdictional 30-day requirement under section 300aa-12(e)(1). *Cf. Butler v. Derwinski*, 960 F.2d 139, 141 (Fed. Cir. 1992) (compliance with jurisdictional time period is "a prerequisite to . . . review and [the statutory language] 'does not authorize the court to extend that time.' " (quoting *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991))).

Inc. v. United States, 20 Cl. Ct. 1, 7 (1990) (citing *Rolls-Royce Ltd. v. United States*, 364 F.2d 415, 419 (Ct. Cl. 1966)); *see also* Fed. R. Civ. P. 82 (Federal Rules must not be construed to extend or limit jurisdiction).

Finally, it is settled law in our sister circuits that Federal Rule of Civil Procedure 60(b), the relevant part of which was entirely adopted by RUSCC 60(b),[6] cannot be employed to toll, extend, or waive the time period in which to appeal.[7] *See, e.g., Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 233 (1st Cir. 1992); *Branum v. Clark*, 927 F.2d 698, 704 (2d Cir. 1991); *Pryor v. United States Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985) (& cases cited therein); *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984); *West v. Keve*, 721 F.2d 91, 97 (3d Cir. 1983); *see also* Fed. R. Civ. P. 60(b) advisory committee's note ("Application to the court under [Rule 60(b)] does not extend the time for taking an appeal. . . ."); *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *see generally* 9 James W. Moore & Bernard J. Ward, *Moore's Federal Practice* § 204.12[1], at 4-79 n.44 (2d ed. 1992). Thus, the Claims Court erred in applying RUSCC 60(b) to provide relief from Congress' carefully circumscribed appellate process under the Vaccine Act.

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6. We examine general federal law interpreting the scope of the corresponding Federal Rule of Civil Procedure as persuasive. *See Aleut Tribe v. United States*, 702 F.2d 1015, 1020 n.10 (Fed. Cir. 1983); *Crone v. United States*, 538 F.2d 875, 884 (Ct. Cl. 1976); *see also Croskey v. United States*, 24 Cl. Ct. 420, 422 n.2 (1991); RUSCC 1(b).

7. The facts of this case indicate that judgment was entered in the Claims Court solely as a result of Widdoss' failure to file within the 30-day period. As such, we decline to interpret Widdoss' motion as anything other than a motion to extend the time period in which to file.

Appendix A

III

Since Widdoss' petition for review was untimely filed and the Claims Court erred in employing RUSCC 60(b) to create jurisdiction to review the merits of the petition, we vacate both the order and judgment below and remand to the United States Court of Federal Claims[8] with instructions to enter judgment in accordance with the special master's decision.

No costs.

VACATED and REMANDED

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8. The United States Claims Court is now known as the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 1992 U.S.C.C.A.N. (106 Stat.) 4506, 4516.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5096

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

Petitioner-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

NEWMAN, *Circuit Judge*, concurring in part, dissenting in part.

I concur in the panel's analysis, insofar as it relates to the application by the United States Claims Court[1] of its procedural Rule 60(b). Although the Claims Court undertook to review the decision of the special master "in the interest of justice", I agree that the untimely filing can not be overcome under Rule 60(b). However, to the extent that the panel majority holds that the thirty-day limit is not subject to waiver or toll for purposes of review of the master's decision because this time limit is "jurisdictional", I respectfully must dissent from the ruling of the panel majority.

In *Spruill v. Merit Systems Protection Board*, 978 F.2d 679 (Fed. Cir. 1992) this court again sought to place in perspective the

1. The Claims Court has since been designated the Court of Federal Claims; for clarity, I retain the name at the time of the appealed decision.

ubiquitously loose usage of the term "jurisdictional". Although we have on occasion used that term to describe situations wherein statutory requirements have not been met, I believe that the analysis is *Spruill* is in better harmony with the analysis of precedent. The Supreme Court explained:

> [W]hen the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim ... [I]f the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.

The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25, (1913) (Holmes, J.). A claim that does not meet a statutory time period may not be a "good" claim, it may not be an actionable claim, but it does not defeat the court's jurisdiction. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) ("As frequently happens where jurisdiction depends on subject matter, the question of whether jurisdiction exists has been confused with whether the complaint states a cause of action.")

Jurisdiction of the National Childhood Vaccine Injury Act was assigned to the United States Claims Court. The Act provides that a request for review by the Claims Court of the decision of a special master must be filed within thirty days of the date of the master's decision. However, the special master is an instrumentality of the Claims Court, and the Claims Court has jurisdiction *ab initio*. Indeed, judgment can be entered only by the Claims Court, even if no request for review is filed. While the step of reviewing the special master's decision requires a timely request therefor, an untimely or no request does not mean that the Claims Court is

devoid of jurisdiction, for the Claims Court already has jurisdiction, and it is on the basis of that jurisdiction that final judgment is entered. The somewhat imprecise draftsmanship of the Vaccine Act can not deprive the court of the jurisdiction that it must retain in order to carry out its assignment. Thus by reconsidering the judgment that had been entered by its clerk of court, the Claims Court was not taking forbidden jurisdiction, whether or not it was acting appropriately under Rule 60(b).

In sum, when petitioner Widdoss was one day late[2] in filing her request for review by the Claims Court of the decision of the special master, this did not raise a "jurisdictional" issue. In denying or granting that review the Claims Court is not determining its jurisdiction. *See Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989) (one year time limit for appeals under the Contract Disputes Act is not "jurisdictional"); *Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 316 (Fed. Cir. 1985) (failure to meet a valid statutory and regulatory requirement is not a "jurisdictional" defect); *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667 (Ct. Cl. 1965) (determination that a plaintiff does not have a statutory right to relief does not deprive the court of jurisdiction *ab initio*); *Amgen Inc. v. U.S. International Trade Commission*, 902 F.2d 1532, 1535 (Fed. Cir. 1990) (correcting the Commission's treatment of a substantive requirement as a "jurisdictional" issue).

I agree with the panel majority that Rule 60(b) is not an avenue of relief for untimeliness. However, this does not implicate the court's jurisdiction, or require on jurisdictional grounds that the

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2. The appeal was mailed on July 3, and did not reach the court by the deadline of July 8.

thirty-day limit can not be tolled or waived in the interest of justice. *See Irwin v. Veterans Administration,* 498 U.S. 89 (1990) (equitable tolling of statutory period of limitations is available in suits against the United States); *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964) (rejecting position that time for filing appeal is "jurisdictional" and can never be waived); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215 (1962) (rejecting argument that filing deadline can not be waived in "unique circumstances"). Indeed, whether a requirement is described as "jurisdictional" does not prohibit recourse to the interest of justice, and does not bar equitable tolling or waiver should the circumstances warrant.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ERRATA

April 5, 1993

Appeal No. 92-5096, *Dawn R. Widdoss, n/b/m Dawn R. Hineline, Individually and as Administratrix of the Estate of Crystal Renee Miller, Deceased v. Secretary of the Department of Health and Human Services*

Precedential Opinion

Decided: March 24, 1993

Please make the following changes:

Page 3, line 20: Delete "30 days after expiration of", and after "special master", insert — shall notify the petitioner of her options either to have the petition remain before the special master or to withdraw the petition, upon submitting written notice to the Claims Court.—;

Page 3, line 21: Delete "loses jurisdiction over the case." delete "U.S.C.", and insert — U.S.C.A. —; and

Appendix A

Page 3, line 22: Delete "300aa-21(b)(2).", insert — 300aa-21(b) (West 1991 & Supp. 1992).[2]—, and renumber subsequent footnotes accordingly.

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2. Prior to November 26, 1991, the date of enactment of the Health Information, Health Promotion, & Vaccine Injury Compensation Amendments of 1991, Pub. L. No. 102-168 (HIHPVICA), § 201, 1991 U.S.C.C.A.N. (105 Stat.) 1102, 1102-04, the statutory scheme provided that if the special master failed to issue a decision within 30 days after expiration of the 240-day period, the special master lost jurisdiction over the case. *See* 42 U.S.C. § § 300aa-12(g), 300aa-21(b)(2). Both sections 300aa-12(g) and 300aa-21(b) were amended retroactive to October 1, 1988 by HIHPVICA, § 201(d), (i)(2), 1991 U.S.C.C.A.N. (105 Stat.) at 1103, 1104.

Page 4, line 28: After "amended by", delete "the";

Page 4, line 29: Delete "Health Information, Health Promotion, & Vaccine Injury Compensation Amendments of 1991, Pub. L. No. 102-168,", and insert —HIHPVICA,—; and

Page 4, line 31: Delete "1102,", and insert —at—.

APPENDIX B — PETITION FOR REHEARING DATED APRIL 12, 1993

CORRECTED PETITION FOR REHEARING AND ADDENDUM BY DAWN R. WIDDOSS, *ET AL.*, PETITIONER-APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 92-5096

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of, CRYSTAL RENEE MILLER, Deceased

Petitioner-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES CLAIMS COURT
JUDGE REGINALD W. GIBSON

ZITO, MARTINO AND KARASEK
RONALD J. KARASEK, Esquire
Pa. I.D. #23233
641 Market Street
Bangor, PA 18013
(215) 588-0224
Attorney for Petitioner-Appellee

April 12, 1993

Appendix B

PETITION FOR REHEARING

Your Petitioner-Appellee, Dawn R. Widdoss, *et al.*, respectfully files the instant Petition for Rehearing pursuant to the Fed.R.App.P.-Federal Circuit-Rule 40 and submits the following points of law or fact have been overlooked or misapprehended by this Honorable Court as follows:

1. The Opinion of this Honorable Court is in conflict with an Opinion of the United States Supreme Court styled *Bowen, Secretary of HHS vs. City of New York, et al,* 476 U.S. 467, 106 S.CT. 2022 (1986). In that case, the Supreme Court held that the 60-day requirement to file a judicial review in Federal District Court of a Social Security Administration denial of benefits is not jurisdictional but is a statute of limitations which can be tolled under various facts or circumstances.

2. The majority Opinion of this Honorable Court acknowledged as follows:

> "[T]he jurisdictional character of the thirty-day time period does not preclude the Claims Court from adjudicating the question of whether Widdoss' petition for review was timely filed, however . . . The Claims Court obviously has jurisdiction to determine if it has jurisdiction." (Citations omitted.) (See Addendum, page A-16)

As a result, the untimely issue should not have been considered as controlling as the claims Court did exactly what this Honorable Court stated it can do pursuant to it's inherent judicial power.

3. If it is admitted that the Claims Court has such jurisdiction, then there must be a procedural vehicle to permit that Court to exercise a review of any untimeliness issue. It is respectfully submitted, such a review was instituted by the Petitioner-Appellee through her Motion for Reconsideration of Judgment and this Motion was properly acted upon by the Claims Court. If there is another method, this Honorable Court has failed to state what that method is.

4. This Honorable Court also overlooked the fact that to calculate the thirty (30) day time period to file a Motion for Review from the date of the filing date of the Special Master's Decision (in this case, June 7, 1991), as opposed to when Petitioner actually received same (June 11, 1991), denies the Petitioner the full thirty (30) day time period in which to act. Indeed, such calculation based upon RUSCC, Appendix J, Rule 11 is different than the calculation which should be made pursuant to 42 U.S.C. Section 300aa-12(e)(1) which states the Motion for Review must be filed within thirty (30) days of the "issuance" (as opposed to "filing") of the Special Master's Decision.

5. To deny the Petitioner the full thirty (30) day period to file the Motion for Review is a denial of due process.

ARGUMENT

A. THE THIRTY (30) DAY TIME PERIOD TO FILE A MOTION FOR REVIEW OF THE SPECIAL MASTER'S DECISION IS NOT JURISDICTIONAL.

Pursuant to the Decision of the United States Supreme Court in *Bowen, Secretary of HHS vs. City of New York, et al,* 476 U.S. 467, 106 S.CT. 2022 (1986), the Supreme Court ruled that the 60-

day time period in which to file a judicial review in Federal District Court of the Secretary's final decision for the denial of social security benefits is not jurisdictional but rather constitutes a statute of limitations which can be equitably tolled. (See 476 U.S. 467, 476-478).

While the equities of the *Bowen* case are different than those in the case *sub judice*, the equities here are *inter alia* the intervening 14-day suspension entered by the Special Master on June 6, 1991 upon which Appellee-Petitioner's counsel relied in calculating the 30-day period to begin on June 21, 1991 (after the suspension expired), the Master's failure to render her decision within 240 days as required by 42 U.S.C. Section 300aa-12(g), the Motion for Review was mailed on July 3, 1991 (five full days before it was allegedly due), there was no prejudice to the government in the filing of the Motion for Review, and the issue is an important one which should not be denied review.

As stated by the Court in *Bowen*, statutory limitation periods as "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" [citing *American Pipe & Construction Co. vs. Utah*, 414 U.S. 538, 554, 94 S.Ct. 746, 766, 39 L.Ed.2d 713 (1974)].

In the instant case, the filing of the Motion for Review (allegedly one (1) day late) certainly is not the type of filing that comes as a surprise or is done in such a fashion as to revive a stale claim where evidence can no longer be mustered.

Further, as heretofore stated, the confusion regarding the filing deadline was caused by the Special Master herself by issuing a 14-day suspension of all proceedings on June 6, 1991 and,

thereupon, issuing her Decision on June 7, 1991 and without making any reference to the effect of her suspension.

Also, it cannot be said that Appellee-Petitioner's counsel was not diligent since a comprehensive Motion for Review was prepared and placed in the mail on July 3, 1991, all within twenty-three (23) days from the receipt of the Decision on June 11, 1991.

B. JURISDICTION TO DETERMINE JURISDICTION:

The Concurring/Dissenting Opinion of this Honorable Court makes clear that whether a requirement is described as "jurisdictional" does not prohibit recourse to the interest of justice and does not bar equitable tolling or waiver should the circumstances warrant. (See Addendum, page A-22.)

However, even the Majority Opinion indicates that the Claims Court has the jurisdiction to determine if it has jurisdiction. (See Addendum, page A-16.) This is precisely what was done by the Claims Court in ruling upon the Petitioner/Appellee's Motion for Reconsideration.

If the Claims Court has such "obvious" jurisdiction to determine if it has jurisdiction, this Honorable Court has failed to state under what statute or rule this can be done. A review of the RUSCC indicates there is no other rule available for relief from a judgment other than Rule 60.

If this Honorable Court is of the opinion that the proper vehicles are the rules regarding the enlargement of time apply [whether RUSCC, Rule 6(b) or RUSCC, Appendix J, Rule 19(b)], then this Honorable Court should say so rather than having counsel guess as to the procedure available for such a review upon the re-entry of the judgment by the Claims Court.

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C. THIRTY (30) DAYS FROM FILING VS. ISSUANCE:

It is respectfully submitted this Honorable Court has overlooked the fact that to calculate the thirty (30) day time period (in which to file a Motion for Review) from the date of the filing date of the Special Master's Decision denies the Petitioner-Appellee the full time in which to act.

At the time of oral argument, Petitioner-Appellee posed to this Honorable Court the rhetorical question of what would occur if the Special Master's Decision was not received by Petitioner until the 29th day after filing. It appears the majority opinion would hold there is no relief for such an event even though the Petitioner would have only one (1) day in which to file the Motion for Review. This certainly cannot be what Congress intended to mean.

Indeed, a review of 42 U.S.C. Section 300aa-12(e)(1) indicates that "[u]pon issuance of the special master's decision, the parties shall have thirty (30) days to file with the clerk of the United States Claims Court a motion to have the Court review the decision". This language is different than the language of RUSCC, Appendix J, Rule 11(a) which requires "the filing of a Motion for Review within 30 days of the filing of the special master's decision. . ."

As has been held, the "issuance" of an Order of an administrative agency requires knowledge of the substance of the Order. [See *Palisades Citizen Association* vs. *District of Columbia Alcoholic Beverage Control Board,* 324 A.2d 692 (1974)]. In the instance case, the Petitioner did not have knowledge of the substance of the Special Master's Decision until it was mailed by the Clerk of the Claims Court on June 10, 1991, (by Federal Express overnight mail) and actually received by the Petitioner/ Appellee on June 11, 1991.

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In a case styled *Sunnyside Nurseries, Inc.* vs. *Agricultural Labor Relations Board et al.*, 156 Cal. Rptr. 152 (1979) the court was asked to construe the California's Agricultural Labor Relations Act. The Act, Labor Code Section 1160.8, provided that an employer's Petition for Review "shall be filed with the Court within thirty (30) days from the date of the issuance of the Board's Order". (See 156 Cal. Rptr. at 155.)

In the *Sunnyside* case, the Court construed the word of "issuance" as follows:

> "The generally accepted meaning of the terms 'issue' and 'issuance' is to 'send forth; to emit; to promulgate; . . . put into circulation . . .' (See Black's Law Dic. (4th rev. ed. 1968), page 964, col. 2; 22A Words and Phrases (1958) page 530. The legislative choice of the word 'issuance' reasonably indicates that something more than 'signing' or 'filing' of the Board's Order was intended. We hold that 'issuance' of the Board's Order occurred when it was mailed to Sunnyside". (See 156 Cal. Rptr. at 155).

Accordingly, using this rationale, the Special Master's Decision was not issued until June 10, 1991, when it was given to Federal Express for overnight delivery on June 11, 1991. If so, the Petition for Review filed on July 9, 1991, was timely.

It is interesting that the RUSCC rules require items to be in hand at the Clerk's Office for them to "count" [See RUSCC, Rule 5 and RUSCC, Appendix J, Rule 17(a)] and this is for good reason. However, that same rationale of having things in hand doesn't seem to work in the reverse for a Petitioner's right to act.

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D. VIOLATION OF DUE PROCESS:

In the instant case, it is uncontroverted that the Special Master's Decision was held by the Office of the Clerk for three days until it was mailed by Federal Express overnight mail on June 10, 1991, and received on June 11, 1991. The holding of this Decision deprived the Petitioner-Appellee the full thirty (30) day time period in which to act and, indeed, this was a critical delay inasmuch as the Motion for Review was filed only one day late.

In a case styled *Marshall Durbin Farms, Inc.* vs. *National Farmers Org., Inc.*, 446 F.2d 353 (5th Circuit, 1971), a preliminary injunction was issued on 6/18/70 and a hearing scheduled on 6/25/70. The defense requested a continuance of the hearing because it was a complicated case but this request was denied because the federal rules required a hearing in five days. On appeal, the Circuit Court of Appeals reversed on the basis that the defense did not have an adequate opportunity to prepare and present a defense irrespective of the rules time requirement. While the facts of the case are dissimilar, the theory of due process is the same, i.e. sometimes compliance with the rules deprives due process, especially when a party is not given a full opportunity in which to act.

CONCLUSION

The Petition for Rehearing should be granted as the 30 day time limit is inapplicable; not only for the reasons that it is not jurisdictional, but also because, in this case, it should not even apply as the Special Master's Decision was beyond the 240 day time limit and, as such, the Master lost jurisdiction of the case.

Further, to calculate the 30 day time limit from the time the

Appendix B

Petitioner actually received notice of the Master's Decision more comports with due process and permits the Petitioner the full 30 days in which to act. This is no uncertainty or guess-work regarding such a calculation and it can easily be made from the date the overnight package is sent.

The SIDs issue in this case is an important one (one of first impression as stated by the Special Master) and should not be denied review on the basis of an untimely filing when the Petitioner was not given the full time in the first instance.

Respectfully submitted,

ZITO, MARTINO and KARASEK
s/ Ronold J. Karasek
Ronold J. Karasek, Esquire
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641 Market Street
Bangor, Pennsylvania 18013
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Dated: April 12, 1993

APPENDIX C — ORDER OF THE COURT OF APPEALS DENYING REHEARING DATED APRIL 30, 1993

ORDER

Before NEWMAN, Circuit Judge, MICHEL, Circuit Judge, and CLEVENGER, Circuit Judge.

A petition for rehearing having been filed by the APPELLEE,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue on May 7, 1993.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK
by s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

Dated: April 30, 1993

cc: MARY HAMPTON MASON
RONOLD J. KARASEK

WIDDOSS V HHS, 92-5096
(CLM - 90-486 V)

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

APPENDIX D — JUDGMENT OF THE COURT OF APPEALS DATED MARCH 24, 1993 ISSUED AS A MANDATE ON MAY 7, 1993

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5096

DAWN R. WIDDOSS, n/b/m DAWN R. HINELINE, Individually and as Administratrix of the Estate of CRYSTAL RENEE MILLER, Deceased,

Petitioner-Appellee,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellant.

JUDGMENT

ON APPEAL from the U.S. Court of Federal Claims *in CASE NO(S).* 90-486 V

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

VACATED AND REMANDED

DATED MAR 24 1993

ENTERED BY ORDER OF THE COURT
s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: May 7, 1993

APPENDIX E — RUSCC, RULE 60(b)

Rule 60. Relief from Judgment or Order

(b) Mistakes; inadvertence; excusable neglect, newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under subdivision (b) of this rule does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action or relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Mar. 15, 1991.)

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES CLAIMS COURT DATED NOVEMBER 21, 1991

IN THE UNITED STATES CLAIMS COURT

No. 90-486V

(Filed: November 21, 1991)

DAWN R. WIDDOSS, ETC.,

Petitioner

v.

THE UNITED STATES,

Respondent

Vaccine Act; motion for review; motion for reconsideration.

Ronald J. Karasek, Bangor, Pennsylvania, attorney of record for petitioner.

Laura S. Radack, Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson*, for respondent.

ORDER

This memorandum order addressed Petitioner's Motion for Reconsideration of the judgment entered pursuant to 42 U.S.C. § 300aa-12(e)(3) by the clerk of the court on July 9, 1991, which states as follows:

Appendix F

> Pursuant to the special master's decision on June 7, 1991, it was held that petitioner is not entitled to an award with the petition to be dismissed.
>
> IT IS ORDERED AND ADJUDGED this date, pursuant to Vaccine Rule 11(a) that the petition is dismissed.

Vaccine Rule 11(a) provides as follows:

> *In Absence of Motion for Review.* In the absence of the filing of a motion for review within 30 days of the filing of the special master's decision, . . . the clerk shall forthwith enter judgment in accordance with the special master's decision.

The foregoing court rule should be read together with the related statutory provision which states as follows at § 300aa-12(e):

> (1) Upon the *issuance* of the special master's decision, the parties shall have 30 days to file with the clerk of the United States Claims Court a motion to have the court review the decision. . . .
>
> (2) Upon the filing of a motion under paragraph (1) with respect to a petition, the United States Claims Court shall have jurisdiction to undertake a review of the record. . . .

* * *

> (3) In the absence of a motion under paragraph (1) respecting the special master's decision . . ., the clerk of the United States Claims Court shall immediately enter judgment in accordance with the special master's decision.

Because the petiioner, as perceived from the record by the clerk of the court, failed to *file* her motion for review of, the special master's adverse decision until July 9, 1991, which allegedly was due on July 8, 1991, a judgment was entered dismissing the petition in accordance with said decision. It is the § 300aa-12(e)(3) action of the clerk of the United States Claims Court which petitioner now seeks to have reconsidered, not by the clerk of the court but rather by a judge of the United States Claims Court.

Nowhere in her motion does petitioner cite to any court rule, statute, or case law supporting an entitlement to "reconsideration" on these facts. All that appears, following a recitation of the perceived operative facts, is a prayer in the last paragraph of said motion —

> . . . that this Honorable Court reconsider the clerk of court's dismissal of the Petition and accept as timely filed the Petitioner's Motion for Review. . . .

The respondent, on the other hand, strenuously opposes said requested relief and further avers that while petitioner has not specifically alleged relief under a Rule 59 motion for reconsideration, said rule is an inapposite vehicle to attack the judgment as entered. Instead of RUSCC 59, respondent contends that even if RUSCC 60(b) is the appropriate rule upon which

petitioner should have pled, *i.e.*, "relief from the operation of the judgment," this court should also deny said motion. We agree that, to the extent petitioner might be entitled to any relief, RUSCC 60(b) is the proper vehicle, which provides, in pertinent parts, as follows:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

For the reasons discussed hereinafter, we are constrained to conclude that the interest of justice requires the granting of petitioner's motion.

Facts

The indisputable operative facts generating the prayer(s) in petitioner's motion may be summarized as follows:

(i) On June 4, 1990, a petition was filed in this court by the administratrix of the estate of Crystal Miller for compensation under the National Childhood Vaccine Injury Act of 1986, as amended, for Crystal's death allegedly stemming from the administration of the DPT vaccine.

(ii) Following a hearing on the petition on January 25, 1991, the special master filed her decision on June 7, 1991, denying the prayer for relief.

Appendix F

(iii) On June 11, 1991, petitioner received the special master's decision.

(iv) Prior to the aforesaid decision entered on June 7, 1991, the special master granted the following suspensions: 30 days for petitioner on January 28, 1991; 60 days for petitioner on March 28, 1991; 7 days for respondent on May 22, 1991; and 14 days for respondent on June 6, 1991.

(v) On July 3, 1991, petitioner mailed her motion for review to the clerk of the court for filing.

(vi) On July 9, 1991, the Claims Court received petitioner's motion for review, and concomitantly therewith on the same day, the clerk of the court, *sua sponte*, entered judgment dismissing the petition, consistent with the special master's June 7, 1991 decision, pursuant to Vaccine Rule 11(a) and 42 U.S.C. § 300aa-12(e)(3).

(vii) On July 12, 1991, the clerk of the Claims Court, by explanatory letter, returned petitioner's motion for review inasmuch as it allegedly was not timely in that it should have been filed on July 8, 1991, *i.e.*, within the 30-day period required for filing a motion for review under § 300aa-12(e)(1).

(viii) On July 19, 1991, Petitioner's Motion for Reconsideration was stamped received in the Office of the clerk. It was later stamped "filed" on August 19, 1991.

(ix) Respondent's opposition to petitioner's motion for reconsideration was filed on September 30, 1991. And

(x) Finally, petitioner's reply in support of her motion for reconsideration was filed on October 15, 1991.

Appendix F

Contentions of the Parties

(a) *Petitioner*

In support of the motion for reconsideration, on the premise that her motion for review was timely, petitioner makes several arguments. First, she says that since the clerk of the court dismissed the petition on the *same* day (July 9, 1991) that the motion for review was received, it is highly probable that said motion was timely received by the clerk on July 8, 1991. Secondly, inasmuch as the special master granted respondent's motion to suspend proceedings for 14 days on June 6, 1991, when her decision on the merits was filed on June 7, 1991, there still remained 13 more days on the suspension. Thus, petitioner concludes that since the statutory 30 days would not begin to run until *after* the expiration of the 14-day suspended period (*i.e.* after June 20, 1991), her motion for review, even if filed on July 9, 1991, was clearly timely. Finally, petitioner also contends that she is entitled to the three-day grace period where "service" is by mail, citing to RUSCC 6(c) and Vaccine Rule 19, thus the due date of the motion for review should have been extended to July 11, 1991.

(b) *Respondent*

Respondent takes issue with all of petitioner's contentions. Specifically, respondent avers that —

(i) petitioner's plea for reconsideration under RUSCC 59 is not the vehicle to attack the judgment of dismissal, but rather, if entitlement exists, her plea should be a motion for relief from judgment pursuant to RUSCC 60(b). This is so because she simply seeks to vacate the entry of judgment;

(ii) 42 U.S.C. 300aa-12(e)(1) requires a motion for review to be filed within 30 days of the issuance of the special master's decision, without any enlargement;

(iii) the provisions of RUSCC 6 and Vaccine Rule 19 provide petitioner no comfort;

(iv) the granting of the 14-day suspension on June 6, 1991, one day prior to the issuance of the special master's decision on the merits, did not prevent her from so acting on June 7,1991; and

(v) any previously entered suspension of proceedings was necessarily vacated *sub silentio* when the special master entered her decision of June 7,1991, thus the 30-day window for filing a motion for review closed on July 8, 1991.

Issues

(i) Whether an order by the special master suspending "proceedings on the petition," entered on June 6,1991, and running 14 days to June 20,1991, to a date after she issues her decision on the merits on June 7, 1991, tolls the running of the 30-day period (§ 300aa-12(e)(1)) until after the suspension period expires?

(ii) Whether petitioner is entitled to relief from judgment pursuant to RUSCC 60(b)? and

(iii) Whether, in connection with the filing a motion for review under § 300aa-12(e)(1), petitioner may add on three (3) days where the mails are utilized consistent with RUSCC 6(c) and Vaccine Rule 19, so that the period would not run until July 11, 1991, making her motion for review timely filed on July 9, 1991?

We shall discuss these various issues seriatim.

Appendix F

Discussion

A. *Suspension of Proceedings — 14 Days (June 6, 1991 - June 20, 1991)*

On June 6, 1991, the special master issued the following order at the behest of the respondent, which apparently was oral inasmuch as the file contains no written request:

> Respondent has requested a 14 day suspension. In light thereof, the following is hereby ordered: Pursuant to Vaccine Rule 9, [1][2] *the proceedings on the petition* in this matter are hereby suspended, for a period of 14 days for good cause shown.

(emphasis added). The next day, June 7,1991, the special master issued her § 300aa-12(d)(3) decision against petitioner notwithstanding the foregoing suspension of proceedings. What is more surprising is the fact that the special master failed to vacate said suspension or to make any reference to its efficacy in her decision on the merits.

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1. Rule 9(a) provides in part as follows: "On the motion of a party, for good cause shown, the special master may suspend proceedings on the petition." This rule tracks the applicable statutory provision. § 300aa-12(d)(3)(C).

2. Rule 9 also contains the following subsection (b): "*Effect.* Such periods of suspension shall be excluded for purposes of the time limitations of 42 U.S.C. § 300aa12(d)(3) and Vaccine Rules 4(b) and 10." We read this provision simply to provide instructions as to how to count the time limitations prescribed in the cited section. It provides no impediment to the special master granting efficacious suspension periods within the maximum allowable days.

Appendix F

Respondent contends that the petitioner seeks to extend or enlarge the 30-day period for filing a motion for review with the clerk of court under § 300aa-12(e)(1) when it is patently clear that that statutory period may not be enlarged. Because it cannot be enlarged, says respondent, the motion for review was not timely even though only one (1) day late, and as a consequence the § 300aa-12(e)(3) dismissal by the clerk of the court was entirely proper.

As we see it, the problem here is simply perception — the respondent sees the glass as "half empty" while the court and the petitioner see the same glass as "half full." In other words, this is not a case where petitioner seeks to merely add on 14 additional days upon the running of the § 300aa-12(e)(1) 30-day filing period (*i.e.*, from July 9 to July 22,1991), but rather, this is simply a case where the 30-day filing period under § 300aa-12(e)(1) did not *begin* to run until *after* the expiration of the 14-day suspended period, *i.e.*, after June 20, 1991. The following analysis establishes the foregoing conclusion:

(i) the special master properly, pursuant to Vaccine Rule 9, suspended "the proceedings on the petition [for 14 days]" on June 6, 1991, *at the request of the respondent;*

(ii) this act, suspension of the proceedings on the petition, legal in all respects, continued until affirmatively vacated or it ran its course;

(iii) the suspension was never vacated by an order of the special master, thus it remained efficacious until June 20, 1991, when it ran its course; and

(iv) since the 30-day period did not *commence* to run until

June 21, 1991, for purposes of filing the motion for review, and petitioner filed said motion on July 9, 1991, it was clearly timely.

The operative language in the special master's June 6, 1991 order leading us to this conclusion is "14 day suspension . . . [of] the proceedings on the petition." Literally read, we understand the quoted words to mean that the respondent requested in its motion — and the special master granted — a suspension or stay of all proceedings on the petition for a period of 14 days. The threshold question now becomes the scope or meaning of the quoted words. The word "suspension" is ordinarily defined as meaning "a temporary stop," or "causing something to cease from operation temporarily." 83 C.J.S. *Suspension* 926 (1953). It ("suspension") is synonymous with the word "stay" of proceedings in that — "A stay is a suspension of the case or some designated proceeding within it. It is a kind of injunction with which a court freezes its proceedings at a particular point." *Black's Law Dictionary,* 1413, 1446 (6th ed. 1990). Thus, "an order to stay [or suspend] proceedings puts an end to all action and no steps can be taken lawfully during its continuance." *Wallace v. Wallace,* 13 Wis. 224, 226 (1860). "Stay" is further defined as meaning "to . . . suspend." 82 C.J.S. *Stay* 1036 (1953). "Stay" is "a stopping; the act of arresting a judicial proceeding by the order of a court." *In re Schwartz,* 14 F. 787 (D.C.N.Y. 1882), and *In re Koome,* 514 P.2d 520, 522 (1973). "Suspend" signifies an act of stopping for a time, implying a temporary inoperative condition. *Yoshida Intern Inc. v. U. S. Customs Court,* 378 F. Supp. 1155, 1162 (1975).

Against this background, we are constrained to conclude that the June 6, 1991 order of the special master, for a 14-day suspension period until June 20, 1991, froze all proceedings during that entire period to the end that no steps could be lawfully taken during the pendency of the suspension. In view of said conclusion,

we further hold that the issuance of the special master's decision, ostensibly on June 7, 1991, was also lawfully "frozen" until after the expiration of the suspended period, *i.e.*, June 20, 1991. Consequently, we must hold that the petitioner's motion for review was timely filed inasmuch as the 30-day filing period did not expire until July 20, 1991.

To reach a contrary conclusion on the facts here would strain credulity. Once a party (here the respondent) is granted its motion to suspend proceedings, certainly the non-movant is entitled to rely on the lawful pronouncement of the special master's order until the contrary appears. The contrary never surfaced. Here, the record shows that petitioner acted timely and prudently at all times in that she filed her motion for review only *one* day after the 30-day period otherwise applicable but for the suspension period and in fact 13 days *prior* to the running of the 30-day period following the expiration of the suspended period. Against this background, the petitioner clearly should not be charged with the confusion caused by the ruling below on the respondent's motion for suspension.

B. *Relief from Judgment — RUSCC 60(b)*

Even assuming *arguendo* that the 30-day response time for filing a motion for review was not tolled by the suspended period, petitioner, on the facts here, would nevertheless have been entitled to relief under RUSCC 60(b) which provides as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

However, it should be noted that relief under this rule is not granted lightly. A "motion for relief from judgment [pursuant to RUSCC 60(b)] is one for extraordinary relief entrusted to the discretion of the Court . . . which may be granted only in exceptional circumstances." *Placeway Const. Corp. v. United States,* 19 Cl. Ct. 484, 488 (1990), *quoting Sioux Tribe of Indians v. United States,* 14 Cl. Ct. 94, 101 (1987), *aff'd* 862 F.2d 275 (Fed. Cir. 1988), *cert. denied* 490 U.S. 1075, 109 S.Ct. 2087 (1989). Nevertheless, "the court's allowance of a motion for relief similar to RUSCC 60(b) is clearly allowable under the Vaccine Rules and in accordance with the spirit and purpose of the Vaccine Act." *Zimmerman v. Secretary of Dept. of Health and Human Services,* No. 90-2758V (Cl. Ct. Sept. 27, 1991) n.2.

It can therefore be stated that RUSCC 60(b) "seeks to strike a delicate balance between . . . the desire to preserve the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." Moreover, it is " 'grand reservoir of . . . power to do justice in a particular case,' that may be tapped by the . . . court in the sound exercise of its discretion, and within the structure inherent in the underlying objectives of the rule." *Primbs v. United States,* 4 Cl. Ct. 366, 368 (1984), *cert. denied,* 471 U.S. 1068, 105 S.Ct. 2147 (1985), *quoting Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 401-402 (1981). Moreover, the court in *Primbs* noted that "strong policies . . . favor the resolution of disputes on their merits." *Id.* at 368, quoting *Jackson v. Beach,* 636 F.2d 831, 835 (D.C. Cir. 1980). In addition, when the judgment being attacked is a default judgment, "Rule 60(b) will be liberally construed in favor of trial on the full merits of the case." *Primbs,* 4 Cl. Ct. at 368, *quoting Seven Elves, Inc.,* 635 F.2d at 403.

In light of the foregoing authorities and, in particular, the facts in this case, petitioner has made a persuasive and timely showing

"justifying relief from the operation of the judgment." RUSCC 60(b)(6). The unorthodox and unexplained nature of the special master's decision to suspend the proceedings for 14 days and then on the following day to dismiss the case without addressing the pending suspended period created a confusing scenario to which petitioner could clearly be prone to honestly believe a 14-day tolling occurred. Despite the strict language of 42 U.S.C. § 300aa-12(e) mandating a 30-day limit to file a motion for review, we hold that the 14-day suspended period does not enlarge the 30-day statutory filing period for a motion for review, but rather it merely tolled by 14 days the period from which the 30-day period will commence to run.

C. *Three-Day Extension*

The three-day extension afforded by RUSCC 6 and Vaccine Rule 19 have no application to the 30-day period for filing a motion for review specified in 42 U.S.C. § 300aa-12(e). For example, Vaccine Rule 19(c) permits additional filing time after service by mail —

> Whenever a party has the right or is required to do some act within a prescribed period after service of a paper, and the service is made by mail, three days shall be added to the prescribed period (unless the special master orders otherwise).

However, the issuance of a decision by the special master pursuant to 42 U.S.C. § 300aa-12(d) is not a method of service of a paper as outlined in Vaccine Rule 19(c). Instead, it is an order of the special master which requires the measuring date to be computed from date the of filing of the decision, regardless of whether the

petitioner receives a copy through the mails. As a consequence, petitioner would not have available the benefit of the three-day extension in this case.

Conclusion

In light of the foregoing discussion, the petitioner has made a timely submission of her motion for review pursuant to 42 U.S.C. § 300aa-12(e). Petitioner has the benefit of a 14-day tolling period as a result of the special master's suspension order pursuant to Rule 9 of the Vaccine Act. Moreover, we find that petitioner also possesses the benefit of RUSCC 60(b) which provides relief from judgment upon the showing of a "reason justifying relief from the operation of the judgment." The special master's confusing issuance of both a suspension of proceedings and a dismissal of the action on consecutive days clearly justifies petitioner's relief from the judgment. Given the foregoing, this court grants petitioner's motion for reconsideration and hereby vacates the clerk's judgment of dismissal. The petitioner shall *FORTHWITH* file her motion for review pursuant to 42 U.S.C. § 300aa-12(e)(1), but no later than December 20, 1991.

IT IS SO ORDERED.

s/ Reginald W. Gibson
Reginald W. Gibson, Judge

APPENDIX G — CALCULATIONS OF THE 240 DAY PERIOD

A review of the calculations through June 20, 1991, are as follows:

Petition filed	6/4/90 to 8/27/90	84 days
1st Suspension for 30 days	8/28/90 to 9/27/90	0 days
Time begins	9/28/90 to 1/27/91	122 days
2nd Suspension for 30 days	1/28/91 to 2/26/91	0 days
Time begins	2/27/91 to 3/27/91	29 days
3rd Suspension for 60 days	3/28/91 to 5/26/91	
(overlaps with 4th Suspension		
of 7 days)	5/22/91 to 5/28/91	0 days
Time begins	5/29/91 to 6/5/91	8 days
5th Suspension for 14 days	6/6/91 to 6/20/91	0 days
Special Master's Decision filed	6/7/91	243 days